

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of:

Petition of Posture Pro, Inc.  
For Retroactive Waiver of  
47 C.F.R. §64.1200(a)(4)(iv)

CG Docket No. 02-278

CG Docket No. 05-338

**PETITION FOR RETROACTIVE WAIVER**

Pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. section 1.3, and Paragraph 30 of the Commission's Order, FCC 14-164 (rel. Oct. 30, 2014), petitioner Posture Pro, Inc. ("Petitioner" or "Posture Pro"), through its attorneys, respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. section 64.1200(a)(4)(iv) ("2006 Order" or "Junk Fax Order") with respect to faxes that have been transmitted by Petitioner with the prior express consent or permission of the recipients or their agents after the effective date of the 2006 Order, but prior to the full compliance deadline of April 30, 2015.<sup>1</sup>

**I. INTRODUCTION**

Posture Pro, which is a small business with 21 employees located in Huntington Beach, California, is a defendant in a putative class action lawsuit that was filed on November 20, 2015, in the United States District Court for the Northern District of Ohio, Eastern Division, entitled *Carradine Chiropractic Center, Inc. v. Posture Pro, Inc.*, Case No. 4:15-cv-2378, ("Litigation") for claims that Posture Pro violated the requirement in Section 64.1200(a)(4)(iv) by sending a fax advertisement, even though with prior permission from the recipient, without the proper opt-

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<sup>1</sup> *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, FCC 14-164, Order, 29 F.C.C. Rcd. 13998 (F.C.C. Oct. 30, 2014) ("October 2014 Order"); *see also* DA 15-1402, Order, 2015 WL 8543949 (F.C.C. Dec. 9, 2015) ("December 2015 Order").

out language specified in the Commission's rules and under the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, as amended by the Junk Fax Prevention Act of 2005 ("TCPA").

Similar to numerous other petitioners who were granted a retroactive waiver by the Commission, Posture Pro faces the prospect of potentially crippling substantial liability and attorneys' fees for failing to include in solicited faxes the precise opt-out language required by the Commission's rules, even though the Commission found that there was understandable confusion about the applicability of the requirement for that opt-out language. As a party similarly situated to those petitioners who have received the Commission's retroactive waivers, and for the same reasons that supported the grant of retroactive waivers in the October 30, 2014 Order, as well as in the August 28, 2015 and December 9, 2015 Orders, Posture Pro respectfully requests that the Commission grant it the same retroactive waiver of 47 C.F.R. section 64.1200(a)(4)(iv).

## **II. BACKGROUND**

The 1991 Telephone Consumer Protection Act prohibits the use of a fax machine to send an "unsolicited advertisement."<sup>2</sup> The plain language and scope of the statute is expressly limited to unsolicited faxes, which is defined to exclude faxes sent with prior express permission.<sup>3</sup>

In 2005, Congress enacted the Junk Fax Preventive Act which, among other things, "required the sender of an unsolicited fax ad to provide specified notice and contact information on the fax that allows recipients to 'opt out' of any future fax transmissions from the sender."<sup>4</sup> Subsequently in 2006, the Commission issued the Junk Fax Order which provided that a fax advertisement "sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii)

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<sup>2</sup> 47 U.S.C. § 227(b)(1)(C).

<sup>3</sup> 47 U.S.C. § 227(a)(5).

<sup>4</sup> October 2014 Order ¶ 4.

of this section,”<sup>5</sup> and thereby appeared to impose an opt-out notice requirement even for solicited faxes. Confusingly, the Junk Fax Order also stated in a footnote that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”<sup>6</sup>

After the 2006 Order was issued, plaintiffs and their attorneys filed numerous class action lawsuits for TCPA violations, including those based on the uncertainty in the statute. Such lawsuits, including the Litigation, have been brought against legitimate companies for sending faxes to recipients who had provided consent to receive faxes by the senders. Many of these class action lawsuits seek millions of dollars in damages based on the Commission’s conflicting statements pertaining to the 2006 Order.

In its October 2014 Order, the Commission acknowledged that there was confusion as to senders’ obligations under the TCPA to include opt-out notices on solicited faxes.<sup>7</sup> The Commission recognized that the “inconsistent footnote” in the Junk Fax Order “caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission.”<sup>8</sup> The Commission explained that the footnote “may have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient.”<sup>9</sup> In addition, the Commission acknowledged that the notice it provided “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express

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<sup>5</sup> 47 C.F.R. § 64.1200(a)(4)(iv).

<sup>6</sup> October 2014 Order ¶ 24 (quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3810 n.154 (2006)).

<sup>7</sup> *See id.* at ¶ 24.

<sup>8</sup> *Id.* at ¶ 24; *see also* ¶ 28.

<sup>9</sup> *Id.* at ¶ 24.

permission of the recipient” and that this lack of explicit notice “may have contributed to confusion or misplaced confidence about this requirement.”<sup>10</sup>

In the October 2014 Order, the Commission concluded that “this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.”<sup>11</sup> The Commission also found “that granting a retroactive waiver would serve the public interest,” because failure to comply with the rule “could subject parties to potentially substantial damages,” and granting a retroactive waiver would ensure that any such confusion did not result in inadvertent violations of the opt-out notice requirement.<sup>12</sup> As a result of these findings, the Commission granted retroactive waivers of Section 64.1200(a)(4)(iv) to certain of those parties who had petitioned for such relief.<sup>13</sup> The Commission also stated that “[o]ther, similarly situated parties, may also seek waivers such as those granted in this Order.”<sup>14</sup>

Subsequently, the Commission granted more than 100 such waivers in its August 28, 2015 Order (“August 2015 Order”) and in its December 9, 2015 Order (“December 2015 Order”), including petitions for waivers filed after April 30, 2015, and including those petitions for petitioners involved in pending litigation, emphasizing that all such petitions concerned only faxes sent prior to April 30, 2015.<sup>15</sup> The December 2015 Order clarified that petitions for retroactive waiver that were filed after April 30, 2015 may also be granted, as long as the

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<sup>10</sup> *Id.* at ¶ 25.

<sup>11</sup> *Id.* at ¶ 26.

<sup>12</sup> *Id.* at ¶ 27.

<sup>13</sup> *Id.* at ¶ 1.

<sup>14</sup> *Id.* at ¶ 30.

<sup>15</sup> *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 02-278, 05-338, Order, 2015 WL 5120879 (F.C.C. Aug. 28, 2015) (“August 2015 Order”); December 2015 Order.

petitioners were similarly situated to the petitioners who were granted a retroactive waiver in the October 2014 Order.<sup>16</sup>

**III. PETITIONER SHOULD BE GRANTED A RETROACTIVE WAIVER  
PURSUANT TO THE COMMISSION'S ORDERS.**

Petitioner respectfully requests that the Commission grant a retroactive waiver of the 2006 Order for any and all solicited faxes sent by Petitioner after the effective date of the 2006 Order and before April 30, 2015. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown.<sup>17</sup> "A waiver may be granted if: (1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule."<sup>18</sup> Both elements apply in the instant case, and Petitioner is similarly situated to the petitioners who were granted retroactive waivers of the 2006 Order as stated in the Commission's October 2014 Order, August 2015 Order, and December 2015 Order. Accordingly, Petitioner is entitled to a retroactive waiver of the 2006 Order.

Petitioner is a defendant in a putative class action lawsuit alleging violations of the TCPA. The plaintiff filed suit on November 20, 2015. The Litigation is currently pending in the United States District Court for the Northern District of Ohio. The plaintiff in the Litigation seeks to recover damages on behalf of itself and others similarly situated in part on the grounds that Petitioner allegedly sent faxes in violation of the TCPA by failing to include the proper opt-out language. However, Petitioner received prior consent from the plaintiff in the Litigation to send the faxes to the plaintiff, before sending such faxes. Moreover, Petitioner received prior consent from any other recipients before sending such faxes.

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<sup>16</sup> December 2015 Order ¶ 18.

<sup>17</sup> 47 C.F.R. § 1.3.

<sup>18</sup> *Id.*; October 2014 Order ¶ 23.



Petitioner is similarly situated to the parties that were granted retroactive waivers by the Commission in its October 2014, August 2015, and December 2015 Orders. In the Litigation, Petitioner is alleged to have sent faxes that did not contain proper opt-out notices. However, the faxes, which were sent in 2012, were sent with the prior express permission of the recipients. Due to the confusion as to senders' obligations under the TCPA to include opt-out notices on solicited faxes as referenced above, Petitioner did not understand the opt-out notice requirement to apply to solicited faxes. Petitioner finds itself potentially subject to massive liability, as well as the costs of litigation which will drive it out of business, based on the application of a provision of the 2006 Order over which the Commission has recognized there was confusion.

Petitioner seeks a retroactive waiver only for those faxes sent prior to the April 30, 2015 deadline. Since that deadline, Petitioner has not sent any fax advertisements that lack the opt-out language or violate the 2006 Order in any other way. The only fax advertisements sent by Petitioner occurred during the time when there was actual confusion over the 2006 Order, as the Commission recognized in its October 2014 Order. In fact, the last time that Petitioner sent any fax advertisements to anyone was in 2012, and Petitioner no longer sends any fax advertisements.

The Commission may grant a waiver where, as here, the underlying purpose of the rules would not be served by application to the instant case; or application of the rules would be inequitable, unduly burdensome, or contrary to the public interest under the particular facts of the instant case.<sup>19</sup> The purpose of the TCPA is to allow consumers to stop unwanted faxes.<sup>20</sup> This purpose would not be furthered by subjecting Petitioner to potentially massive liability for faxes that did not contain proper opt-out notices where the recipients had provided prior express permission to receive such faxes and confusion existed over the rules relating to such faxes.

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<sup>19</sup> 47 C.F.R. § 1.925(b)(3)(i)-(ii). *See also* 47 C.F.R. § 1.3 (the Commission may waive any provision of its rules for good cause shown).

<sup>20</sup> October 2014 Order ¶¶ 4-5.

Moreover, it would be inequitable and unduly burdensome to allow Petitioner, a small business with at least 4 to 5 small suppliers and their employees that depend on Petitioner for their survival, to be subjected to such massive liability for faxes that were sent with prior consent during a time when there was confusion over the 2006 Order. Thus, the grant of a retroactive waiver to Petitioner would serve the public interest in that the factors that weighed in favor of the grant of retroactive waivers to the petitioners addressed by the October 2014, August 2015, and December 2015 Orders are similarly applicable here, and good cause exists for the grant of a retroactive waiver to Petitioner.

#### IV. CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Commission grant it a retroactive waiver from liability under the TCPA and the FCC's regulations and orders relating to fax advertisements sent prior to April 30, 2015 to recipients who had provided prior permission or consent to receive such faxes, but where such fax advertisements did not contain opt-out notices in compliance with 47 C.F.R. section 64.1200(a)(4) (iv).

DATED: February 23, 2016

Respectfully submitted,

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